

Decision mailed: 9/24/10
Civil Service Commission 03

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place - Room 503
Boston, MA 02108
(617) 727-2293

DARARITH UNG,
Appellant

v.

CASE NO: D1-08-150

CITY OF LOWELL,
Respondent

Appellant's Representative

Valerie McCormack, Esq.
Louison, Costello, Condon & Pfaff, LLP
100 Summer Street: 4th Floor
Boston, MA 02110

Appointing Authority's Representative:

Maria Sheehy, Esq.
Assistant City Solicitor
City of Lowell – Law Department
375 Merrimack Street – 3rd Floor
Lowell, MA 01852-5909

DECISION ON RENEWED MOTION TO REOPEN APPEAL

The Appellant, Dararith Ung, duly filed this appeal with the Civil Service Commission (Commission) in June 2008 against the City of Lowell (Lowell), as Appointing Authority for the Lowell Police Department (LPD), challenging the Appellant's termination as a LPD Police Officer. The appeal was subsequently withdrawn voluntarily by the Appellant and dismissed by Decision of the Commission dated July 17, 2008. In March 2009, the Appellant moved to reopen the appeal, which motion Lowell opposed. On August 20, 2009, the Commission denied the Motion to Reopen, without prejudice to renewal upon certain conditions.

The now Appellant seeks to reopen this appeal, which Lowell opposes on the grounds that the Appellant failed to satisfy the conditions for reopening, and on the grounds that the Commission lacks authority to reopen the appeal. After hearing on April 27, 2010, the Commission requested that Lowell provide additional information to the Commission concerning the possibility that the delay in the Appellant's pursuit of this matter may

have caused prejudice to the City of Lowell, and in particular, the availability of the witnesses that Lowell would need to call to present its case. Based on the information received at the hearing, and subsequently, it does appear that all witnesses that Lowell may be expected to call are still potentially available and subject to subpoena and that the prejudice to reopening the matter does not appear to outweigh the Appellant's interest in seeing that the reasons for his termination as a Lowell Police Officer receive a hearing on the merits.

Lowell has a point that the initial motion filed by the Appellant to renew his request to reopen this appeal did not strictly comply with the conditions imposed by the Commission's prior ruling. In particular, the Commission required, as a condition to reopening, that (1) the Appellant produce written documentation that his pending related appeal in the Appeals Court (seeking to arbitrate the termination) was finally disposed of, and (2) a written waiver of certain claims to back-pay for the intervening periods between the original withdrawal of the appeal and its reinstatement. However, the Appellant cured these defects at or prior to the hearing of the motion (See attached Exhibits "A" and "B"). The Commission accepts these efforts as good faith and substantial compliance with the Commission's prior rulings, deems the Appellant's motion to be amended, nunc pro tunc, and, after carefully considering the arguments of the parties and balancing the equities, the Commission now grants the Renewed Motion to Reopen, subject to the condition that the Appellant has made the necessary knowing and voluntary waiver of any benefits to which he may otherwise be entitled for the periods from July 24, 2008 to March 26, 2009 and from February 10, 2010 to September 23, 2010 (or any later effective date of this "Decision on Renewed Motion to Reopen Appeal", if stayed by subsequent court order).

As to the Commission's authority to reopen a previously dismissed case, the Commission rejects that argument for the reasons expressed in the Commission's initial "Decision on Motion to Reopen Appeal" dated August 20, 2009 and the Commission's "Decision on Motion to Reconsider" dated October 7, 2009.

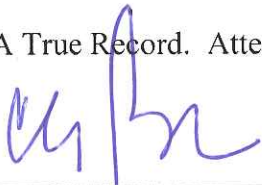
This appeal will be set down for a full hearing, for which no continuances may be granted unless for grave cause.

Civil Service Commission

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Henderson, Marquis, McDowell & Stein, Commissioners on September 23, 2010.

A True Record. Attest:



Commissioner

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision.

Notice to:
Douglas I. Louison, Esq. (for Appellant)
Maria Sheehy, Esq.. (for Appointing Authority)
John Marra, Esq. (HRD)